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No. 83-346

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ESMAIL YERMIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In our opening brief we showed that both the language and legislative purpose of the federal false statement statute, 18 U.S.C. 1001, support the conclusion that knowledge of federal involvement is not an element of a Section 1001 offense and that that conclusion is consistent with the purposes generally served by culpability requirements and jurisdictional language. In his brief, respondent acknowledges that he acted wrongfully in making false statements on a Department of Defense security clearance form he filled out at his employer's request and that such conduct therefore warranted imposition of criminal sanctions. See, *e.g.*, Resp. Br. 20 n.9, 21, 28. However, he urges the Court to reject a construction of Section 1001 that would encompass his false statements, contending that the same construction would

bring within the statute certain hypothetical false statements made casually to a neighbor that would not warrant criminal prosecution. In fact, respondent's hypotheticals are a red herring, since they would not fall within the scope of Section 1001 in any event.

Respondent states forthrightly that his own false statements were made for the purpose of defrauding his employer, and he appears to acknowledge that he could be prosecuted under a state statute for those statements. See Resp. Br. 20 n.9, 21, 22 n.11, 28. Under respondent's own reasoning, there would be no basis for challenging a federal criminal prosecution for his false statements on the theory of surprise or lack of adequate notice, since state law placed him on notice that his conduct was criminal. However, respondent presents two hypotheticals designed to demonstrate that an interpretation of Section 1001 that does not require proof of knowledge of federal involvement would penalize noncriminal conduct. Respondent first describes (Br. 20-21) the situation of an individual who, in the course of a casual conversation, replies to a neighbor's question by stating falsely that he had not been fired from a job; a representative of a federal agency that is performing a security clearance on the individual later approaches the neighbor, who repeats the lie. Respondent next poses (Br. 25) the hypothetical of an individual who, again in the course of a casual conversation, replies to a neighbor's question by stating falsely that he has three children (rather than two); the neighbor then repeats the information to a federal representative who is investigating the individual's claim for AFDC benefits. Respondent contends that such false statements, though not made with any criminal intent, would nevertheless be found to constitute a violation

of Section 1001 under our interpretation of the statute.

The simple answer to respondent's hypotheticals is that they involve statements that are not made "in [a] matter within the jurisdiction of any department or agency of the United States" within the meaning of Section 1001 and thus would not be prosecutable under that statute. Indeed, we explained this very point in our opening brief (at 37 n.27). It is difficult to imagine that any casual conversation that occurs in a personal context (*e.g.*, between neighbors) could involve a matter within federal agency jurisdiction at the time it is made. That the statement is repeated to a federal agency at some later point would not change the fact that at the time the original statement was made it was not in a matter within the agency's jurisdiction.[1] Unlike the hypotheticals, respondent's false statements *do* fall within the scope of the statute, since respondent's employer obtained his statements as part of the process of obtaining a Department of Defense security clearance for him.

In a similar vein, respondent urges that this case should be distinguished from *United States* v. *Feola*, 420 U.S. 671 (1975), in which the Court held that knowledge that the victim is a federal officer is not an element of a violation of the federal assault statute,

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[1] As this Court has recognized, the purpose of the "in any matter" phrase is to narrow the scope of the false statements Section 1001 otherwise would reach. See *United States* v. *Bramblett*, 348 U.S. 503, 508 (1955). Perhaps Congress could have enacted a statute that reached the hypothetical statements respondent suggests if it had imposed sanctions for false statements that were transmitted to the government or that affected the government in some way. However, Congress chose not to legislate so broadly.

18 U.S.C. 111. Respondent points out that assault is a criminal violation under the law of all states, while some false statements may not be covered by state criminal statutes. Respondent suggests that his conduct is more like that at issue in *Lambert* v. *California*, 355 U.S. 225 (1957), in which the Court held unconstitutional as applied a Los Angeles ordinance that made it criminal for a convicted felon to remain in the city for more than five days without registering with law enforcement officials.

Respondent's arguments are wide of the mark. He himself acknowledges (Br. 22 n.11) that some (we would suggest most) false statements made in a matter within federal agency jurisdiction but not made directly to the agency (presumably including his own) could be prosecuted under state fraud or false pretenses statutes. While some statements that fall within Section 1001 (as we interpret it) might not be reachable under state law (because, *e.g.*, they were not made for the purpose of obtaining a monetary advantage), we do not believe *Feola* suggests that federal and state criminal statutes must be precisely congruent; rather, the Court in *Feola* concluded that Congress would not have intended to create a "snare for the unsuspecting" (420 U.S. at 685) by transforming otherwise innocent conduct into a federal crime. Respondent acknowledges that his own false statements were not innocently made. We suggest that a false statement made in a matter within federal agency jurisdiction would normally be made in some sort of business or other nonpersonal setting (*e.g.*, an application for benefits) and would rarely (if ever) constitute innocent conduct; rather, an individual who makes such a statement "knows from the very outset that his conduct is wrongful" (*ibid.*).

Clearly such false statements are quite unlike the mere act of remaining in Los Angeles, which triggered criminal penalties under the ordinance at issue in *Lambert* v. *California*.

2. Respondent contends (Br. 5-16) that the language of Section 1001 is ambiguous and that its legislative history demonstrates a narrowly limited legislative purpose that does not extend to false statements like the ones he made. These contentions are unpersuasive.

As we showed in our opening brief, a natural reading of the language of Section 1001 indicates that Congress did not require proof of knowledge of federal agency involvement. The statute does not refer to any "intent to deceive" the federal government, nor does it refer to an individual who makes a false statement "knowing it is made" in a matter within federal agency jurisdiction. On its face, the statute requires only that a false statement that is made knowingly and willfully also be made in a matter within federal agency jurisdiction. The 1948 recodification, which respondent characterizes as rendering Section 1001 ambiguous, in fact clarified it by more definitively setting apart the "in any matter" language from the body of the statute.

Respondent contends that Congress's purpose in amending the federal false statement statute in 1934 was simply to overrule *United States* v. *Cohn*, 270 U.S. 339 (1926), so that it would be clear that the statute extended to false statements that did not involve a monetary claim against the government. While Congress surely intended the 1934 amendment to close the *Cohn* loophole (see *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941)), the change it made was far more extensive. The tenor of the legislative history makes it clear that Congress was interested in providing comprehensive protection for federal func-

tions. See *ibid.* Respondent himself acknowledges (Br. 18-19 n.8) that application of Section 1001 to statements that are not made directly to the federal government is faithful to the spirit of congressional intent. If that is so, there is no reason to conclude that Congress meant simultaneously to exclude many such statements from coverage by imposing a requirement of knowledge of federal involvement.

To the extent statements in the legislative history may leave in doubt just how far Congress meant to go in expanding the scope of protection, the statutory language it chose reveals the breadth of its purpose. Congress did not replace the old "intent to defraud the United States" language with the phrase "intent to deceive the United States" (as it presumably would have done if it wished simply to overrule *Cohn*); it eliminated altogether any reference to intent in connection with the United States and instead inserted the phrase "in any matter within the jurisdiction of a department or agency of the United States" at the very end of the false statement section. Respondent points to nothing in the legislative history that would suggest that Congress in fact intended a narrower change than the language itself indicates.[3]

3. Respondent contends (Br. 26) that it will not be difficult for the government to obtain convictions under Section 1001, even if it is required to prove beyond a reasonable doubt that an individual knew

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[3] Because the language and legislative purpose of Section 1001 are not ambiguous, there is no reason to apply the principle of lenity. See, *e.g.*, *McElroy* v. *United States*, 455 U.S. 642, 658 (1982); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977). And see *United States* v. *Bramblett*, 348 U.S. at 509-510 (although "criminal statutes are to be construed strictly * * * this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

his false statement was made in a matter within federal agency jurisdiction. It may well be that, even under the court of appeals' interpretation of the statute, the government would obtain convictions in some situations in which a false statement was not made directly to the government, but in which it nevertheless appears clear that the maker must have known the statement was made in a matter within federal agency jurisdiction. But the evidence may not always be so convincing. Moreover, as we noted in our opening brief (at 23), it will not necessarily be a simple matter for the government to produce evidence to rebut a defendant's own claim that he was unaware of federal involvement. Respondent himself urges (Br. 35-37) that there should be a subjective standard of knowledge, which would require proof beyond a reasonable doubt that an individual actually knew of federal involvement, rather than a "should have known" standard. Respondent presumably believes that he could have been acquitted under a subjective knowledge standard, despite the fact that the form he signed was captioned "Department of Defense Personnel Security Questionnaire" and included a large warning that any false statements would result in prosecution under Section 1001. Respondent's position itself contradicts his suggestion that requiring the government to prove knowledge of federal involvement beyond a reasonable doubt will not impede the interest in protecting federal functions.

For the foregoing reasons, and the reasons set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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